Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

(3)

No. 94-1518

In The

Supreme Court of the United States

October Term, 1994

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,

Petitioners,

v.

PAUL CASAROTTO and PAMELA CASAROTTO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GRANT D. PARKER
Counsel of Record
SARA J. JOHNSON
MULLENDORE, TAWNEY & WATT, P.C.
310 West Spruce Street
Missoula, MT 59802
(406) 542-5000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, a state court may enforce state laws governing arbitration when the parties agree to apply state law, and when application of state law does not undermine the goals and policies of the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Decision Below 3

REASONS FOR DENYING THE WRIT 5

I. THE MONTANA SUPREME COURT PROPERLY APPLIED STATE LAW, WHICH DOES NOT UNDERMINE THE GOALS AND POLICIES OF THE FAA, TO A CONTRACT WHICH SELECTED STATE LAW 5

II. THE DECISION OF THE MONTANA SUPREME COURT IS IN CONCERT WITH EXISTING CASELAW 7

III. THE MONTANA SUPREME COURT DECISION IS NOT A GOOD VEHICLE FOR ADDRESSING THE CONCERNS RAISED BY PETITIONERS 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834 (1995) 12, 13

American Airlines, Inc. v. Wolens, 115 S.Ct. 817 (1995) 10

Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837 (Mo. 1985) 7, 8

Chor v. Piper, Jaffray & Hopwood, Inc., 862 P.2d 26 (Mont. 1993) 12

David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991) 9

Downey v. Christensen, 825 P.2d 557 (Mont. 1992) 12

Edenfield v. Fane, 113 S.Ct. 1792 (1993) 10

Home Buyers Warranty Corp. II v. Lopez, 115 S.Ct. 930 (1995) 12

Larsen v. Opie, 771 P.2d 977 (Mont. 1989) 12

Mastrobuono v. Shearson Lehman Hutton, 115 S.Ct. 1212 (1995) 5, 7

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 13

Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1 (1983) 13

Passage v. Prudential-Bache Securities, 727 P.2d 1298 (Mont. 1986), *cert. denied*, 480 U.S. 905 (1987) 12

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 13

TABLE OF AUTHORITIES – Continued

Page

Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) . . 9, 10

Snap-On Tools v. Vetter, 838 F. Supp. 468 (D. Mont. 1993) 9

So. Health Corp. of Hamilton, Inc. v. Lorance, 115 S.Ct. 930 (1995) 12

Terminix Int'l Ltd. P'ship v. Jackson, 115 S.Ct. 930 (1995) 12

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) . . . . . *passim*

Vukasin v. D.A. Davidson & Co., 785 P.2d 713 (Mont. 1990) 12

Webb v. R. Rowland & Co., 800 F.2d 803 (8th Cir. 1986) 7

William Gibson, Jr. v. James Graff Communications, Inc., 780 P.2d 1131 (Mont. 1989) 12

STATUTES:

9 U.S.C. § 1 *et seq.* . . . . . *passim*

9 U.S.C. § 2 . . . . . 4, 6

9 U.S.C. § 3 2

9 U.S.C. § 202 9

Mont. Code Ann. § 27-5-114(4) (1993) 4

No. 94-1518

In The

Supreme Court of the United States

October Term, 1994

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,

Petitioners,

v.

PAUL CASAROTTO and PAMELA CASAROTTO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Paul and Pamela Casarotto respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 886 P.2d 931 (1994).

STATEMENT OF THE CASE

A. Factual Background

Respondents Paul and Pamela Casarotto brought an action in Montana district court to recover damages for

various tort and contract claims against Petitioners Doctor's Associates, Inc. ("DAI"), and Nick Lombardi ("Lombardi"), DAI's Montana Development Agent. Pet. App. 2a. DAI is a Connecticut corporation which franchises Subway Sandwich Shops nationally and internationally. Pet. App. 2a. Lombardi is an independent contractor who serves as DAI's Montana Development Agent. Pet. App. 2a.[1]

Pursuant to 9 U.S.C. § 3, the Montana district court granted Petitioners' motion to stay the lawsuit as against DAI and Lombardi pending arbitration. Pet. App. 5a. The Montana Supreme Court reversed. Pet. App. 17a.

For the purposes of its review, the Montana Supreme Court presumed the following facts alleged in the complaint were true. Pet. App. 2a. The Casarottos entered into a Franchise Agreement with DAI which allowed Casarottos to open a Subway Sandwich Shop in Great Falls, Montana. Pet. App. 2a-3a. Lombardi informed Casarottos that their preferred location in Great Falls was

---

[1] Even though Mr. Lombardi was not a signatory to the arbitration agreement, he has tried to bootstrap onto DAI's arguments, and appears to claim that he is entitled to arbitration based on a franchise agreement to which he is not a party. DAI carefully avoids confirming or denying whether it considers its independent contractor Lombardi an agent. Pet. 4-5, n.4; Appellees' Response Brief at 7-8, 21-22, 26, *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994). Franchisor's own circulars attempt to avoid any agency relationship and describe Lombardi and other "Development Agents" as *independent contractors*. DAI's Franchise Offering Circular for Prospective Franchisees as Required by the Federal Trade Commission ("Franchise Offering Circular"), Appendix to brief for the Appellants, Exhibit 2, at 9, *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994).

unavailable. Pet. App. 3a. Casarottos agreed to open a shop at a less desirable location based upon a verbal agreement with Lombardi reserving for Casarottos the exclusive right to open a Subway shop in the preferred location when it became available. Pet. App. 3a. Contrary to that agreement, Lombardi and DAI subsequently awarded the preferred location to another franchisee. Pet. App. 3a. As a result, Casarottos' shop suffered irreparably and they lost their business and the collateral securing their SBA loan. Pet. App. 3a.

Page nine of DAI's standard Franchise Agreement contains an arbitration clause which calls for arbitration of claims in Bridgeport, Connecticut. Pet. App. 3a-4a. The full text of the arbitration clause is set forth at Pet. App. 3a-4a, n.2. The Franchise Agreement calls for the application of state law, and designated Connecticut law. Pet. App. 4a.

B. Decision Below

Applying established conflict-of-law principles, the Montana Supreme Court held that Montana law governed the franchise agreement entered into between Casarottos and DAI. Pet. App. 5a-10a.[2] The Montana court determined that Montana had a materially greater interest than Connecticut in a contract negotiated in Montana, to be performed in Montana, the subject matter of

---

[2] Because the Montana Supreme Court reversed the district court, it did not reach the issue as to whether the arbitration agreement in DAI's contract would extend to its independent contractor, Nick Lombardi.

which was a sandwich shop in Montana, and entered into between Montana residents and a Connecticut corporation. Pet. App. 8a. The Montana court then found the contractual provision selecting Connecticut law was not effective because it violates fundamental public policy in Montana, the state with the materially greater interest. Pet. App. 8a-10a.

Petitioners do not challenge the Montana court's application of standard conflict-of-law principles to hold that Montana law applied. What Petitioners challenge is the result of applying Montana law, and more particularly, Montana's statutory notice requirements at Mont. Code Ann. § 27-5-114(4) (1993). Pet. App. (i).

The challenged decision addressed whether Montana's notice requirement is preempted by Section 2 of the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.*). Pet. App. 10a-17a. Relying on this Court's analysis in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), and standard preemption analysis, the Montana court found it was not. Pet. App. 16a. Montana's notice statute is not preempted by Section 2 of the (FAA) because it does not undermine the goals and policy of the FAA. Pet. App. 16a-17a. Because Petitioner DAI's agreement did not comply with Montana's statutory notice requirements, the agreement is not subject to arbitration according to Montana law. Pet. App. 17a.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it does not raise issues that warrant review by this Court. The Montana Supreme Court decision was based on a permissible state court application of state law to a contract in which the parties agreed to abide by state law. This Court will not question a state court's interpretation of state law when parties agree to apply state law in an arbitration agreement. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989); *accord Mastrobuono v. Shearson Lehman Hutton*, 115 S.Ct. 1212, 1217 n.4 (1995).

Contrary to Petitioners' protestations, the decision below is consistent with this Court's holding in *Volt*, 489 U.S. 468. Further, the decision below does not conflict with caselaw from the Circuits or that of other states. Since the Supreme Court's ruling in *Volt*, no Federal Circuit court or state court of last resort (except Montana) has addressed the applicability of the FAA to state law notice requirements when the parties agreed to apply state law. This question has not received the degree of judicial scrutiny which would warrant issuance of a writ of certiorari.

I. THE MONTANA SUPREME COURT PROPERLY APPLIED STATE LAW, WHICH DOES NOT UNDERMINE THE GOALS AND POLICIES OF THE FAA, TO A CONTRACT WHICH SELECTED STATE LAW.

The Montana court's decision is narrowly drawn to apply state law in a contract selecting state law, and is

consistent with *Volt*. The parties to the arbitration agreement expressly agreed to apply state law. Pet. App. 5a. The Montana Supreme Court undertook a thorough conflict-of-law analysis, applying standard conflict-of-law principles in reaching its decision to apply Montana law. Pet. App. 5a-10a. Petitioners do not challenge the Montana Supreme Court's application of Montana law and choice of law analysis, instead requesting review solely on the question of whether Section 2 of the FAA preempts Montana's notice requirement. Pet. App. (i)

The Montana Supreme Court relied on this Court's decision in *Volt* to find that the FAA did not preempt Montana's notice requirement. The Montana Supreme Court stated:

> Our conclusion that Montana's notice requirement does not undermine the policies of the FAA is based on the Supreme Court's conclusion that its was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to arbitrate when they have not agreed to do so. The Court held that the purpose of the FAA is simply to enforce arbitration agreements into which parties had entered, and acknowledge that the interpretation of contracts is ordinarily a question of state law.

Pet. App. 16a; *citing Volt*, 489 U.S. at 474.

The Montana Supreme Court decision was based on a permissible state court application of standard conflict-of-law principles to a contract in which the parties agreed to abide by state law. This Court has indicated that it will

not set aside a state court's interpretation of state law when parties agree to apply state law. *Volt*, 489 U.S. at 474; *accord Mastrobuono*, 115 S.Ct. 1212, 1217 n.4 (1995). This Court will allow parties in arbitration agreements to choose to apply state law. *Mastrobuono*, 115 S.Ct. at 1217. Thus, this Court does not sit to review the matters of state law addressed by the Montana Supreme Court.

II. THE DECISION OF THE MONTANA SUPREME COURT IS IN CONCERT WITH EXISTING CASE-LAW.

In attempting to demonstrate a conflict, Petitioners mischaracterize the holding of the Montana Supreme Court and other cited decisions. In fact, the authorities which Petitioners rely on are readily distinguished from the instant proceeding because they i) do not include the pre-emption analysis in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), or ii) fail to contain contractual provisions which select state law. In the contract drafted by franchisor DAI the parties agreed to be governed by state law. DAI's arguments fail because they do not address cases where parties contractually agreed to subject themselves to state law. The authority relied on by DAI is inapposite.

Cases cited by DAI in attempting to demonstrate a conflict include two cases decided before *Volt*, *Webb v. R. Rowland & Co.*, 800 F.2d 803 (8th Cir. 1986) and *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837 (Mo. 1985). In *Webb* the Eighth Circuit applied a pre-*Volt* analysis to a contract which invoked Missouri law. 800 F.2d at 806. *Volt*, as cited by the Montana court, clarifies that

when the parties have agreed to be bound by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.[3] Pet. App. 14a. Applying this Court's preemption analysis, as clarified in *Volt*, the Eighth Circuit should reach a different decision regarding the application of the Missouri statute. DAI's attempt to portray a conflict based on pre-*Volt* cases which have lost their authority in light of the Supreme Court's intervening decision in *Volt* should fail.

Similarly, in *Bunge Corp.*, a decision four years before *Volt*, the Missouri Supreme Court found a contractual dispute subject to the rules and regulations of the National Grain and Feed Association was subject to arbitration. 685 S.W.2d at 838. While the Missouri court acknowledged that Missouri's statutory notice requirements could not be applied to undermine the FAA, the court refrained from invalidating Missouri's statute, stating, "[w]e do not have to decide, and we do not decide, whether an arbitration agreement *governed by Missouri law* is unenforceable in all events. . . . " *Id.*, at 839. Emphasis supplied. Thus the Missouri court, foreshadowing this Court's decision in *Volt*, expressly sidestepped the decision addressed squarely by the Montana Supreme Court.

---

[3] Petitioners argue that the Montana court erroneously interpreted *Volt* as limiting preemption of state law to those instances in which the state law "undermines the goals and policy of the FAA." Pet. App. 14. Ironically, the Montana Supreme Court quoted the offending phrase (Pet. App. 14a) directly from *Volt*. 489 U.S. at 477-78.

Furthermore, the decision of the Montana Supreme Court addressed a distinct issue from those cases in which parties did not invoke state law. In *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 247 and 250 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991), the parties agreed to arbitration in accordance with the rules and regulations of the London Metals Exchange. Accordingly, the Second Circuit applied the international Convention (9 U.S.C. § 202) as a specific unit of the FAA.[4] Similarly, where parties agreed to be bound by the FAA, with no selection of state law, the federal district court applied those rules. *Snap-On Tools v. Vetter*, 838 F. Supp. 468 (D. Mont. 1993). These decisions, enforcing contracts according to those rules by which the parties agreed to be bound, are in accord with the Montana Supreme Court decision in the instant case.

Similarly, the First Circuit's decision in *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), gave no consideration to the ability of parties to apply state law through a choice-of-law provision. In that case, the First Circuit found that the FAA preempted Massachusetts regulations concerning predispute arbitration agreements for securities brokers. No consideration was made of the ability of the

---

[4] Unlike the current case, the decision in *Threlkeld* involved international commerce, an area in which the policy favoring arbitration is "even stronger" and "applies with special force." *Threlkeld*, 923 F.2d 248, *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Additionally, *Threlkeld* applied Section 202 of the FAA, 9 U.S.C. § 202, rather than Section 2, at issue in this case.

parties to invoke state law through a choice-of-law provision. *Connolly* addresses a distinct issue from that presented in this case where franchisor invoked state law by the terms of its own Franchise Agreement.

The Montana decision is squarely consistent with *Volt*, and does not directly conflict with any decision of this Court, nor of any court of appeals. There is no split in the circuits nor an intolerable conflict between the highest state courts.

Moreover, and without conceding the point, even if one were inclined towards the view that the Montana Supreme Court's decision conflicts with rulings by other courts, the "conflict" Petitioners allege is plainly tolerable at this time. Try as Petitioners might, they could only identify two post-*Volt* cases, in addition to this case, from state supreme courts or federal appellate courts in which the validity of state notice requirements has been litigated. This proceeding is the only one in which the parties selected state law. Significantly, there is no conflict between the decision below and any ruling of the Ninth Circuit, such that a different result might obtain depending upon whether a claim arising in Montana was filed in Montana state court or federal court. *Compare American Airlines, Inc. v. Wolens*, 115 S.Ct. 817 (1995), and *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (granting review in cases where state and federal courts reached opposite conclusions).

If anything, the weakness in Petitioners' line of attack is illustrated by their reliance, at least in part, on dire predictions about what state legislatures and other courts might do if this lone decision from the Montana Supreme

Court is allowed to stand (Pet. 20-23), a tacit concession that the legal issue they raise has not yet matured to the point that review by this Court is appropriate at this time. Thus, when all is said and done, Petitioners' real quarrel with the decision below is the fact that they lost. That is not sufficient reason for this Court to grant review.

III. THE MONTANA SUPREME COURT DECISION IS NOT A GOOD VEHICLE FOR ADDRESSING THE CONCERNS RAISED BY PETITIONERS.

The Petitioners attempt to portray the Montana decision as one of national importance. Pet. 20-23. However, Montana is the only state to hold that the state notice provision is applicable when parties select state law in their contract, and no federal circuit court has ruled on this particular issue after *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989).[5] Should the states rise and follow Montana's lead regarding the pre-emptive scope of the FAA, as Petitioners predict (Pet. at 23), actual conflicts may appear and the issue will then be more appropriate for this Court's review. Those cases may provide a more germane vehicle, strictly limited to signatories to a contract, rather than including the development agent/independent contractor of one of the parties seeking protection of the arbitration provisions.

---

[5] As of May 11, 1995, no other court has cited *Casarotto*, despite the plethora of arbitration litigation.

Nor is the challenged case from a state supreme court which has demonstrated consistent hostility toward arbitration.[6] As Petitioners readily conceded below, the Montana Supreme Court, "has consistently upheld the federal policy in favor of arbitration and applied the FAA to arbitration clauses in contracts involving interstate commerce." Brief for the Appellees Nick Lombardi and Doctor's Associates, Inc., at 9, *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994). The Montana Supreme Court's decisions have repeatedly upheld the validity of arbitration agreements.[7] In light of their own concessions below,

---

[6] *Cf. Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S.Ct. 834 (1995) (granting review and concurrently vacating and remanding the following additional Alabama Supreme Court decisions for further consideration in light of its decision: *Home Buyers Warranty Corp. II v. Lopez*, 115 S.Ct. 930 (1995); *Terminix Int'l Ltd. P'ship v. Jackson*, 115 S.Ct. 930 (1995); and *So. Health Corp. of Hamilton, Inc. v. Lorance*, 115 S.Ct. 930 (1995)).

[7] *See, e.g., Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26 (Mont. 1993) (finding contracts requiring arbitration are as enforceable in Montana as any other contracts); *Downey v. Christensen*, 825 P.2d 557 (Mont. 1992) (holding franchisor's participation in discovery did not waive right to compel arbitration); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713 (Mont. 1990) (finding arbitration clause in annual review document an enforceable part of employment agreement); *William Gibson, Jr. v. James Graff Communications, Inc.*, 780 P.2d 1131 (Mont. 1989) (finding contract involving interstate commerce subject to the FAA); *Larsen v. Opie*, 771 P.2d 977 (Mont. 1989) (holding claim of fraud in the inducement of the execution of a contract containing an arbitration clause is to be decided by arbitration); *Passage v. Prudential-Bache Securities*, 727 P.2d 1298 (Mont. 1986), *cert. denied*, 480 U.S. 905 (1987) (holding parties subject to arbitration even if customer agreement at issue was found to be a contract of adhesion).

Petitioners' assertions of the Montana Supreme Court's hostility toward arbitration (Pet. 12-13) ring hollow.

This Court has consistently held that the FAA only places arbitration agreements on the same footing as other contracts, but does not make super contracts out of such agreements.[8] Companies such as Petitioner DAI routinely draft the contracts in question, and certainly can make their own choice whether to select state law.

---

[8] *Allied-Bruce Terminix Companies, Inc.*, 115 S.Ct. at 840; *Volt*, 489 U.S. at 474-75 (stating the FAA does not give parties powers in excess of any other contract clause); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (recognizing a party may exclude certain claims from the scope of their arbitration agreement); *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1983) (finding the FAA puts arbitration clauses on the same footing as other contracts and reflecting a general federal policy favoring arbitration); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding the Federal Arbitration Act makes arbitration agreements "as enforceable as other contracts, but not more so").

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GRANT D. PARKER
Counsel of Record

SARA J. JOHNSON
MULLENDORE, TAWNEY & WATT, P.C.
310 West Spruce
Missoula, Montana 59802
(406) 542-5000

Counsel for Respondents

Dated May 15, 1995